Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States

JEFFREY D. PHILLIPS,
Petitioner,

v.

CSX TRANSPORTATION, INCORPORATED,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress intended to exclude normal railroad switching operations from requirements of the Federal Safety Appliance Act.

2. Whether railroad workers who are injured while switching cars equipped with defective grab irons and handholds are protected by the Federal Safety Appliance Act.

3. Whether, without statutory basis, and in conflict with relevant decisions of this Court, the Fourth Circuit Court of Appeals excluded normal yard switching operations from the Federal Safety Appliance Act by adopting a novel, narrowly drawn definition of when railroad cars are "in use" for purposes of the Act.

4. Whether, having adopted a novel statutory interpretation, the court of appeals should have remanded the case for further proceedings on petitioner's abandoned claims under the Federal Employer's Liability Act.

LIST OF PARTIES

The parties to the proceeding below were Petitioner, Jeffrey D. Phillips and Respondent, CSX Transportation, Incorporated.

The following parties were third party defendants in the trial court, but were dismissed by motion of CSX Transportation, Incorporated at the trial level and did not participate in the appeal: Procor Alberta Incorporated, Falconbridge Limited, Union Tank Car Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
A. Introduction	4
B. Factual Findings by the Court of Appeals	4
C. Additional Facts	6
D. District Court Proceedings	7
E. Fourth Circuit Proceedings	8
REASONS FOR GRANTING THE PETITION	9
I. CONGRESS CLEARLY INTENDED TO APPLY THE FEDERAL SAFETY APPLIANCE ACT TO NORMAL RAILROAD SWITCHING OPERATIONS	11
II. THIS COURT AND NUMEROUS CIRCUITS HAVE RULED CONSISTENTLY THAT THE SAFETY APPLIANCE ACT APPLIES TO NORMAL SWITCHING OPERATIONS	14
A. United States Supreme Court Cases	14
B. Court of Appeals Decisions	17
C. The Train Brake Cases	19

TABLE OF CONTENTS—Continued

Page

III. AN EVOLVING LINE OF AUTHORITY FROM THE FOURTH CIRCUIT IMPROPERLY RESTRICTS APPLICATION OF THE SAA TO A NARROWLY DEFINED AND FACT SPECIFIC TEST OF WHETHER THE CAR IS "IN USE" 23

A. *Deans v. CSX Transportation, Inc.* 23

B. *Phillips v. CSX Transportation, Inc.* 25

IV. THE COURT OF APPEALS IMPROPERLY ENTERED FINAL JUDGMENT ON BEHALF OF THE RAILROAD 28

CONCLUSION 29

TABLE OF AUTHORITIES

CASES — Page

Baltimore & O.R. Co. v. Tittle, 4 F.2d 818 (6th Cir. 125) 18
Brady v. Terminal R.R. Assn., 303 U.S. 10 (1938) .. 16, 27
Deans v. CSX Transp., Co., Inc., 152 F.3d 326 (4th Cir. 1998) 9, 23, 24, 25
Delk v. St. Louis & San Francisco R.R., 220 U.S. 580 (1911) 15, 22, 27
Fort Street Union Depot Co. v. Hillen, 119 F.2d 307 (6th Cir. 1941) 18
Great Northern Ry. Co. v. Otos, 239 U.S. 350 (1915) 13, 17
Johnson v. Southern Pacific Co., 196 U.S. 1 (1904) 12, 21, 22
Louisville & J. Bridge Co. v. United States, 249 U.S. 534 (1919) 22
Minn. & St. Paul Ry. v. Popplar, 237 U.S. 369 (1915) 15, 22
Noforlk & Western Railway Co. v. Hiles, 116 U.S. 40 (1995) 10, 12
San Antonio Ry. v. Wagner, 241 U.S. 476 at 479 (1916) 15
Southern Ry. Co. v. Crockett, 234 U.S. 725 (1914) .. 12, 22
Southern Ry. Co. v. Snyder, 187 F 492 (6th Cir. 1911) 18
Southern Railway Co. v. United States, 222 U.S. 20 (1911) 12, 15, 22
St. Louis & Iron Mountain Ry. v. Taylor, 210 U.S. 281 (1908) 21, 27
St. Louis Merchants' Bridge T. Ry. Co. v. Schuerman, 237 F 1 (8th Cir. 1916) 15, 18
Texas & Pacific Ry. v. Rigsby, 241 U.S. 33 (1916) .. 13, 22, 27
Trinidad v. Southern Pac. Transp. Co., 949 F.2d 187 (5th Cir. 1991) 7, 25
United States v. Chesapeake & O. Ry. Co., 213 F 748 (4th Cir. 1914) 17
United States v. Chicago B. & Q. R. Co., 237 U.S. 410 (1915) 22, 27

TABLE OF AUTHORITIES—Continued

	Page
United States v. Seaboard Airline Railroad Co., 361 U.S. 78 (1959)	22
United States v. Erie R.R., 237 U.S. 402 (1915)	19, 20, 21
STATUTES	
Act of March 2, 1893, c. 196; 27 Stat. 31 § 4	12, 13
28 U.S.C. § 1254	2
28 U.S.C. § 1331	7
45 U.S.C. § 51	2, 7
45 U.S.C. § 53	2
45 U.S.C. § 56	2, 7
49 U.S.C. § 20301	2, 7, 19, 24
49 U.S.C. § 20302	2, 7, 19, 24
FORMER 45 U.S.C. § 4	3
FORMER 45 U.S.C. § 6	3
FORMER 45 U.S.C. § 9	3
OTHER AUTHORITIES	
H. Rep. No. 1678, 52d Congr., 1st Sess.	11, 27
Sen. Rep. No. 1049, 52d Cong., 1st Sess. 1 (1892)	11

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OPINIONS BELOW

The decision by the United States Court of Appeals for the Fourth Circuit is reported as *Phillips v. CSX Transportation, Incorporated*, 190 F.3d 285 (4th Cir. 1999), and has been reproduced in Appendix A. The underlying order of the district court granting partial summary judgment is unreported but appears as Appendix B.

JURISDICTION

The court of appeals entered its original decision on September 3, 1999. On September 17, 1999, petitioner filed a timely petition for a rehearing and suggestion for a rehearing *en banc*. The court denied the petition and suggestion on October 8, 1999 (Appendix E).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 20302 of the Federal Safety Appliance Act provides, in pertinent part:

> [A] railroad carrier may use or allow to be used on any of its railroad lines—
>
> * * * *
>
> (2) [A] vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;
>
> * * * *
>
> (5) a train only if—
>
> (A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and
>
> (B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

Section 20301 of the Safety Appliance Act provides, "in this chapter, 'vehicle' means a car, locomotive, tender, or similar vehicle."

Other statutes relevant to this appeal are (1) The Federal Employer's Liability Act, 45 U.S.C. §§ 51, 53 and 56; and (2) former provisions of the recodified Safety

Appliance Act, 45 U.S.C. §§ 4, 6 and 9. Pertinent statutory text is reproduced in Appendix F.

STATEMENT OF THE CASE

This case involves fundamental questions of railroad safety. Since its passage in 1893, the Federal Safety Appliance Act has prescribed minimum standards for safety equipment used on railroad cars and trains. Among other things, the FSAA requires that rail cars be equipped with automatic couplers, secure sill steps, efficient handbrakes and secure grab irons or handholds. The Act is remedial and this Court has consistently construed it broadly in order to accomplish its purposes of promoting safety while railroad workers couple and uncouple cars. Its terms have been applied liberally to all cars except those expressly withdrawn from service for repairs. More specifically, the Safety Appliance Act has been applied uniformly to cars engaged in switching operations.

Nevertheless, an evolving line of authority from the Fourth Circuit severely restricts application of the Act. Under two new decisions, including petitioner's case below, the Fourth Circuit has interpreted the FSAA as applicable only to a narrowly drawn, and fact specific definition of cars that are "in use". In proceedings below, the Fourth Circuit expressly held that, "the [Federal Safety Appliance Act] does not apply to train cars involved in switching operations", App. A, p. 8a. This conclusion ignores more than eighty years of decisions by this Court and conflicts with reported decisions from the Fifth and Sixth Circuits, as well as previous decisions from the Fourth Circuit itself.

More significantly, however, the Fourth Circuit's holding that the Safety Appliance Act does not apply to switching operations, effectively repeals the Act as it re-

lates to the activity to which it is needed most: coupling and uncoupling cars in railroad yards. The decision below is illogical and has no basis either in the Act itself or in prior decisions of this Court.

A. Introduction

Petitioner is a brakeman/conductor employed by the CSX railroad. He suffered severe back injuries while attempting to climb onto a tank car his train crew was switching at the defendant's rail yard in Cumberland, Maryland.

The trial court concluded that the broken handrail violated requirements of the Safety Appliance Act and entered partial summary judgment for Mr. Phillips, holding the railroad strictly liable for his injuries. A jury trial followed and resulted in a verdict of $444,650.00. Following post trial motions by CSX, the trial court reduced this verdict substantially, a decision Mr. Phillips appealed to the Fourth Circuit.

CSX filed a cross appeal claiming that the district court erred in its summary judgment determination of safety appliance issues. Agreeing with CSX, the court of appeals' reversed the trial court's summary judgment and entered final judgment for CSX. Phillips now petitions for a writ of certiorari to reverse this decision and remand the case for further proceedings on Phillips' initial appeal.

B. Factual Findings by the Court of Appeals

The Fourth Circuit conducted its own *de novo* review of the summary judgment record in this case. The following recitation of facts is taken verbatim from the court's reported opinion.

On July 20, 1994, Jeffrey Phillips was injured while performing his duties as a brakeman for CSX Transporta-

tion. At the time of his injury, Phillips was the foreman of a yard crew engaged in normal train switching operations at CSX's Cumberland Yard in Cumberland, Maryland. Such operations consist of taking arriving trains apart, and putting departing trains together.

The normal procedure when a train arrives at the yard is for the yard crew to disconnect all of the train's cars from one another, and to turn the cars over to the car department for a mechanical inspection. As part of its inspection, the car department checks the cars' safety appliances. If the car department discovers any defects during this inspection, it sets the defective cars aside for repair. Once the mechanical inspection is complete, the car department turns the cars back over to the yard crew. The yard crew then assembles the cars into new trains for departure. However, before a train may depart, it must undergo a predeparture inspection, which the car department also conducts. The yard crew engages the handbrakes on the cars in an assembled train, detaches the engine, and then turns the train over to the car department for the predeparture inspection. The car department inspects the train's air brakes, and again checks its safety appliances. Once the predeparture inspection is complete, the car department turns the train over to the transportation crew, and the train departs.

Phillips was injured while he was engaging the handbrakes on a completed train, prior to turning the train over to the car department for its predeparture inspection. The train upon which he was working was sitting on a yard track. Phillips had set the handbrakes on three of the cars in the train, and he was climbing onto a fourth car when the handrail he was using to pull himself up gave way, causing him to fall and injure his back.

C. Additional Facts

The summary judgment record considered by the court of appeals contained several facts omitted in the reported decision but which bear emphasis here.

In answers to interrogatories, CSX admitted that the car which injured Phillips had been in its possession for forty days prior to Phillips' injury. Just as importantly, the car had arrived at CSX's Cumberland Yard the same day that Phillips was injured, and had been inspected for safety appliance defects earlier in the day, facts also acknowledged in the railroad's answers to interrogatories.

Phillips' own affidavit in support of summary judgment contained a number of other facts which were not directly controverted by the railroad.

The yard track on which Phillips' train was located at the time of his injury was an "outbound" track from which the train would have departed. It was not a repair track or storage track; nor was it located in a repair shop or repair facility. The car in question did not have a so-called "bad order" tag, and it had not been withdrawn from service by CSX.

At the time of Phillips' injury, the cars were connected to an engine and its air brakes were activated. Phillips was part of a switching crew, and at the time of his accident, the train's engineer and brakeman were located on the locomotive.

Mr. Phillips' crew had not completed its work at the time of the accident. Although the cars had been assembled as a train, the crew needed to set handbrakes on the cars before releasing the train to the car department for pre-departure inspection.

D. District Court Proceedings

Mr. Phillips filed suit against CSX Transportation, Inc., on July 7, 1995. His complaint alleged a violation of the Federal Employer's Liability Act, (45 U.S.C. §§ 51-60, as amended) and the Federal Safety Appliance Act (re-codified in 1994 as 49 U.S.C. § 20301, *et seq.*). Jurisdiction in the district court was founded upon 45 U.S.C. § 56, and 28 U.S.C. § 1331.

The railroad denied Phillips' allegations but filed a third party complaint against the owners of the defective car claiming indemnity. These claims were subsequently dismissed without prejudice in the trial court.

On August 6, 1996, the district court granted Phillips' motion for partial summary judgment, concluding that CSX was liable for his injuries because the defective hand rail which injured him violated the Safety Appliance Act. See Appendix B. Simultaneously, the court overruled CSX's cross-motion for summary judgment on safety appliance issues, rejecting its argument that the Act did not apply because the car was being used in switching operations at the time of Phillips' injury. See Appendices B and C.

The railroad based its argument largely on *Trinidad v. Southern Pac. Transp. Co.*, (949 F.2d 187 (5th Cir. 1991)), a case involving air brake provisions of the FSAA. In a letter to counsel on the day of oral summary judgment argument, the district judge noted the differing statutory treatment of train brakes and grab irons under the Safety Appliance Act. Based upon the plain language of 49 U.S.C. § 20302(a)(2), the district court pointed out that grab iron provisions of the Act apply to cars rather than completed trains and, "are intended to protect individuals engaged in coupling and uncoupling of *cars* not to cars only when part of an assembled train".

See Appendix C. Emphasis in original. By contrast, the FSAA's power brake provisions apply to *trains* and therefore are inapplicable during switching operations while the train is being assembled. *Trinidad* was an air brake case and, therefore, was not persuasive to the district judge.

Having prevailed under the Safety Appliance Act, Phillips then abandoned his fault based FELA claims and proceeded to trial on damages only.

Trial was commenced in Baltimore on August 19, 1996. During three days of evidence, the jury heard testimony from a total of ten witnesses, including the plaintiff, a co-worker, four physicians, a vocational rehabilitation specialist and an economist. On August 23, 1996, the jury returned a verdict in favor of Phillps for $444,650.00 in monetary damages, $370,000.00 of which was allocated by special verdict to "future medical expenses" and "future economic loss".

On September 13, 1996, CSX renewed a previous Rule 50 motion, asking for judgment as a matter of law. In part, CSX challenged the evidentiary basis for the jury's award for future damages. The court held these motions under advisement for nearly a year. On August 29, 1997, the district court granted CSX's motion for judgment n.o.v., striking the jury's verdict for future medical expenses and virtually all of the verdict for future economic loss. Phillips' appeal to the Fourth Circuit resulted.

E. Fourth Circuit Proceedings

In the court of appeals, Phillips challenged the district court's post trial reduction of his future damages. CSX complained in a consolidated appeal that the district court had erroneously entered judgment against the railroad because the defective tank car, was not "in use" at the time of Phillips' injuries.

On August 11, 1998, in the midst of the Phillips' briefing schedule, the Fourth Circuit decided *Deans v. CSX Transp., Co., Inc.*, 152 F.3d 326 (4th Cir. 1998), another Safety Appliance Act case. In *Deans*, the court of appeals announced for the first time, a fact specific multiprong test to determine whether a car was "in use" for FSAA purposes.

On September 3, 1999, the Fourth Circuit issued a *per curiam* opinion denying Phillips' appeal and agreeing with CSX that the district court had erred in its summary judgment decision. Articulating its view that, "the FSAA does not apply to train cars involved in the switching process," the court of appeals held that Phillips was not protected by the Act's requirements for secure handholds. App. A, page 8a. Accordingly, the court reversed the district judge's summary judgment and entered final judgment for the railroad, treating Phillips' damage appeal as moot. Significantly, the court refused to remand the case for further proceedings on the abandoned FELA theories, even though its decision was an extension of the "in use" test newly articulated in *Deans*. Phillips, of course, had based his decision to rely upon the district court's summary judgment ruling two years before *Deans* was decided in the Fourth Circuit.

On September 17, 1999, Phillips filed a timely petition for rehearing, citing numerous cases from this Court in conflict with the Fourth Circuit's conclusions regarding the FSAA's application to switching operations. Phillips' petition was denied on October 8, 1999.

REASONS FOR GRANTING THE PETITION

More than 100 years ago, Congress confronted the ultra hazardous nature of railroad work, particularly switching operations. The Safety Appliance Act recognized that railroad workers are helpless to protect them-

selves from cars lacking basic safety appliances, including automatic couplers, standard height drawbars, power train brakes, grab irons and hand brakes. Since its passage in 1893, the FSAA has dramatically reduced the number and seriousness of injuries to railroad workers.[1] No small part of the Act's success has been its near universal application to railroad operations, and the strict liability it imposes on railroads to compensate rail workers for deficiencies in congressionally mandated safety appliances.

The Act has become an important element of the injury compensation system for railroad workers, eliminating the need to prove fault for injuries caused by missing, defective, or malfunctioning safety appliances.

Beginning with its earliest Safety Appliance Act decisions, this Court recognized the Act's remedial purpose and construed it liberally to enhance railroad safety. In so doing, this Court and lower federal courts have broadly applied the Act's provisions to virtually all railroad operations, most especially switching.

The court of appeals' decision in this case is a radical departure from eighty years of Supreme Court precedent. Moreover, its decision that cars are not "in use" during switching operations is directly counter to reported decisions in other circuits.

This case presents a federal issue of exceptional importance not only to railroad workers but to the public at large. Although the Fourth Circuit's decision in petitioner's case is limited to grab irons and handrails, its reasoning applies equally to automatic couplers, draw heads, ladders, hand brakes, and other safety appliances required under the FSAA. Left undisturbed, the decision

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[1] For a recent discussion of the Act's effectiveness in reducing coupling accidents, see, *Norfolk Western Railway Co. v. Hiles*, 116 U.S. 40 (1995).

below amounts to nothing less than judicial repeal of a fundamental safety law as it applies to the area of railroad operations where it is needed the most. Yard switching operations require the most frequent coupling and uncoupling of cars as well as the most frequent setting and release of hand brakes. In those operations, more than in any other, trainmen are required to climb, ride and control railroad cars, often while the cars are in motion. Without the protection of adequate and functional safety appliances, these activities are as dangerous as they were in 1893 when Congress acted to stem the tide of amputations and deaths.

The court of appeals' decision is without basis in the statute and runs counter to eighty years of settled precedent in this Court and various circuits. The issue is one of overriding importance not only to Mr. Phillips but to every American railroad worker who depends upon the safety protections Congress intended.

I. CONGRESS CLEARLY INTENDED TO APPLY THE FEDERAL SAFETY APPLIANCE ACT TO NORMAL RAILROAD SWITCHING OPERATIONS

In 1889, railroad operations caused over 2,000 deaths and 20,000 injuries. Sen. Rep. No. 1049, 52d Cong., 1st Sess. 1 (1892). In successive annual messages to the Congress commencing in 1889, President Harrison called for legislation that would provide for uniformity in the construction of cars used in interstate commerce and for the use of improved safety appliances. *Id.* In 1889 and 1890, 38 percent of these deaths and 46 percent of the injuries resulted while employees were coupling cars or setting brakes. H. Rep. No. 1678, 52d Cong., 1st Sess., p. 3.

Congress responded in 1893 with passage of the Safety Appliance Act. Congress' intent in passing the act could

not have been clearer. The statute's preamble declared that the law was, "to promote the safety of employees and travelers upon railroads". Act of March 2, 1893, c. 196; 27 Stat. 31, 4.

This Court recently commented on the law's immediate impact on railroad safety: "its success in promoting *switch-yard safety* was stunning". *Norfolk & Western Railway Co. v. Hiles*, 116 U.S. 40 (1995). Emphasis added. Within two years of the Act's effective date, coupling accidents had been reduced to only four percent of all employee accidents, compared to thirty eight percent between 1877 and 1887. *Id.* Between 1892 and 1902, coupling related accidents, dropped from nearly 11,000 to just over 2,000. *Id.*

Commencing with its earliest decisions applying the Safety Appliance Act, this Court recognized not only the congressional purpose of the Act, but also the law's remedial nature. As early as 1904, the Court noted that, "[t]he primary object of the Act was to promote the public welfare by securing the safety of employees and travelers, and it was in that aspect remedial. *Johnson v. Southern Pacific Co.*, 196 U.S. 1 at 17. See also, *Southern Railway Co. v. United States*, 222 U.S. 20 (1911) [designated safety appliances were, "calculated to promote the safety of [interstate traffic and of the employees engaged in its movement" at 26]; *Southern Ry. Co. v. Crockett*, 234 U.S. 725 (1914) [broad application of the Act is, "based upon the declared purpose of Congress to promote the safety of employees and travelers upon railroad engaged in interstate commerce" *Id.* at 733].

Although a principal object of the Safety Appliance Act was to promote the use of uniform automatic couplers, Congress also mandated the use of other safety appliances, including grab irons and hand holds. Act of

March 2, 1893, c. 196; 27 Stat. 31, § 4. This Court quickly acknowledged Congress' intent that these devices were every bit as important as the couplers themselves. In *Texas Pacific & Ry. v. Rigsby*, the Court imposed strict liability against the railroad when a yard switchman was injured while descending a car equipped with a defective grab iron. 241 U.S. 33 (1916). The Court explained:

> There can be no question that a boxcar having a handbrake operated from the roof requires a secure ladder to enable the employee to safely ascend and descend, and that the provision quoted was intended for the especial protection of employees engaged in duties such as that which the plaintiff was performing. *Id.* at 37.

It is equally clear from even the earliest Supreme Court cases that the Safety Appliance Act has been rigidly applied to switching and switchyard operations. The grab iron injury in *Rigsby* occurred to a switchman who,

> [w]as engaged, with others of the yard crew, in taking some "bad order" cars to the shops there to be repaired. The switch engine crew went upon a spur track, hauled out three cars, and switched them upon the main line. 241 U.S. 33 at 36.

A year earlier, in *Great Northern Ry. Co. v. Otos*, the Court easily imposed what it called "absolute liability" on a railroad employer in a switching case involving a defective coupler. 239 U.S. 350 (1915). In *Otos*, the facts of the plaintiff's injuries are reported as follows:

> The plaintiff . . . was a *switch foreman* and was breaking up a train that had come into his State from the west. At the moment when he was hurt, he had three cars attached to the *switching engine* . . . in the *switching operation* the plaintiff, being

> unable to uncouple [a] car from the side where the pin lifter was missing without going between the cars, did so while the cars were moving and was badly hurt. *Id.* at 350. Emphasis added.

The declared purpose of the Safety Appliance Act was to reduce injuries occurring during braking and coupling accidents. This clearly stated intent, together with even the earliest decisions from this Court, demonstrate the purpose of Congress to apply the Act's protection to normal railroad switching operations.

II. THIS COURT AND NUMEROUS CIRCUITS HAVE RULED CONSISTENTLY THAT THE SAFETY APPLIANCE ACT APPLIES TO NORMAL SWITCHING OPERATIONS

A. United States Supreme Court Cases

Otos and *Rigsby* are by no means the only cases in which this Court has applied the Safety Appliance Act to normal switching operations. In fact, it may be correctly assumed that because of Congress' intent to prevent injuries while coupling and braking trains (*Johnson*), the Act most frequently applies to switching operations.

Petitioner in this case was injured while his crew was assembling a train. The car which injured him had been in CSX's possession for forty days, and had arrived at CSX's yard the day of the injury. The car had been inspected once but not withdrawn from service, after arriving as part of an inbound train. Phillips was hurt while assembling the car into an outbound train. His injury occurred on an outbound track and not in a repair facility. None of his duties involved inspection or repair.[2]

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[2] As the decisions of this Court demonstrate, however, the FSAA would apply even in a case where a railroad switchman was taking a defective car to a point of repair. See *Brady, infra.*

Eighty-six years ago, in one of the first Safety Appliance Act cases, the Supreme Court enforced the SAA under very similar circumstances. In *Southern Ry. v. Crockett*, the injured worker was a switchman who was injured while, "making up a train", 234 U.S. 725 (1914). In *Crockett*, this Court did not hesitate to apply the Act, noting that 1903 amendments to the SAA, "had enlarged the scope of the original act so as to embrace all locomotives, cars, and similar vehicles used on any railway that is a highway of interstate commerce, whether the particular vehicles were at the time employed in interstate commerce or not". 234 725 at 734, citing *Southern Ry. Co. v. United States, supra.*

Similarly, in *San Antonio Ry. v. Wagner*, the plaintiff was injured while, "engaged in switching at one of the defendant's yards"; 241 U.S. 476 at 479 (1916). Again, this Court had no difficulty applying the SAA to protect the injured worker from a defective coupler. *Id.* Similar results were reached in *Minn. & St. Paul Ry. v. Popplar*, 237 U.S. 369 (1915) [brakeman injured by defective coupler while a car was being "kicked" to a siding. 337 *Id.* at 370]; *St. Louis & Iron Mountain Ry. v. Taylor*, 210 U.S. 281 (1908) [road switching]; *Delk v. St. Louis & San Francisco R.R.*, 220 U.S. 580 (1911) [plaintiff "undertook to switch certain cars out of a string of nine cars". *Id.* at 523].

In proceedings below, the court of appeals placed great emphasis on protecting the railroad from strict liability provisions of the Safety Appliance Act. In its view, "the purpose of the 'in use' limitation is to give rail car operators the opportunity to inspect for and correct safety appliance defects before the FSAA exposes the operators to strict liability for such defects". App. A, p. 7a. This conclusion, however, is impossible to reconcile

with previous holdings of this court which have imposed strict liability even in cases where a defect has been detected, and the car is being removed to a repair facility *for purposes of correcting the defect.* Most significant among these cases is *Brady v. Terminal R.R. Ass'n*, 303 U.S. 10 (1938).

Like Phillips, the *Brady* plaintiff was injured by a defective grab iron while engaged in normal switching operations. Unlike Phillips, however, who was setting handbrakes (the precise activity the SAA was intended to protect), Brady was injured while inspecting a car in order to discover the existence of any mechanical defects. 303 U.S. 10 at 11. A threshold question in *Brady* was whether the car was "in use" at the time of the plaintiff's injury. Noting that the car had not been withdrawn from service and had not reached a place of repair, this Court had little difficulty in concluding that the car was "in use" for purposes of the Safety Appliance Act:

> The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation, if found defective, it would be subject to removal for repairs. It is not a case where a defective car has reached a place of repair . . . the car in this instance had not been withdrawn from use . . . the car was still in use though motionless. 303 U.S. 10 at 13, citations omitted.

Next, the Court considered whether the railroad was insulated from liability because Brady was injured while inspecting for defects. Again, there was no question that the broad remedial purpose of the SAA protected even this activity. After briefly reviewing the history and purpose of the Act, which by 1938 was familiar territory, the Court held, "we think these considerations require the conclusion that one is not to be denied the benefit of the

Act because his work was that of inspection for the purpose of discovering defects". 303 U.S. 10 at 16. To similar effect, see *Great Northern Ry. v. Otos, supra*, a case in which the plaintiff was injured after a defect had been discovered and while the car was being moved to a point of repair.

An unbroken line of authority from this Court recognizes that the Safety Appliance Act applies to switching operations, even to activities in switch wards calculated to determine the existence of safety appliance defects.

B. Court of Appeals Decisions

One of the clearest applications of the Safety Appliance Act to switching operations comes from the Fourth Circuit itself:

> It is a matter of common knowledge that the danger incident to coupling cars is as great, if not greater, in switching yards than on the line between stations. . . . To hold that the words "while such car was being used by such carrier upon its line of railroad" are intended to limit the statute in its application to the main line would, in a large degree nullify the act. When we consider the statute in regard to safety appliances, we are forced to the conclusion that it must have been the intention of Congress that the same should apply to side tracks and yard tracks as well as main lines. *United States v. Chesapeake & O. Ry. Co.*, 213 F 748 at 751-752. (4th Cir. 1914).

The Fourth Circuit's opinion in Phillips' case that the Safety Appliance Act does not apply to switching operations is startling in light of this language. Nevertheless, the court neither discussed nor distinguished its own eighty-two year old precedent in denying Phillips the protection of the Act.

Nor did the court consider similar authority from other courts of appeal. *Southern Ry. Co. v. Snyder* (187 F 492 (6th Cir. 1911)), was another switching case in which it was no defense that the safety appliance defect had been discovered and the plaintiff was in the process of removing the car and apparently was being sent for repair at the time of his injury. 187 F 492 at 494 (syllabus by the court). Resolving the case as an "in use" question, the Sixth Circuit noted, "one of the prominent objects of the federal safety appliance acts is the protection of railroad employees in the making up and unmaking of trains, and of sorting cars in connection therewith." 187 F 492 at 498.

In 1941, the Sixth Circuit specifically applied the Safety Appliance Act to a switching accident caused by a defective grab iron, the defect at issue in Phillips' case. In *Fort Street Union Depot Co. v. Hillen*, the *plaintiff was* injured when a grab iron apparently sheared off, throwing him to the ground. 119 F.2d at 310. The Sixth Circuit had no trouble concluding that the car was "in use" even though it was motionless and in a switching yard at the time of the accident. 119 F.2d 307 at 312. See also, *Baltimore & O.R. Co. v. Tittle*, 4 F.2d 818 (6th Cir. 1925) ["plaintiff was a member of a switching crew" *Id.* at 819].

The Eighth Circuit also has had no difficulty applying the FSAA to switching accidents even where there was evidence that the defendant railroad had exercised reasonable care to comply with the law. *St. Louis Merchants' Bridge T. Ry., Co. v. Schuerman*, 237 F 1 (8th Cir. 1916) [plaintiff was a "switch foreman and was employed in switching cars engaged in interstate commerce" at 3].

C. The Train Brake Cases

With only one statutory exception, the requirements of the Safety Appliance Act apply to railroad *cars* used by a carrier. The unambiguous language of the statute prohibits the use of any *vehicle* unless it is equipped with automatic couplers, secure sill steps, efficient hand brakes, secure ladders and running boards, and secure grab irons and hand holds. 49 U.S.C. § 20302(a)(1), (2), and (3). "Vehicle" as defined by the Act, "means a car, locomotive, tender or similar vehicle". 49 U.S.C. § 20301(a).

Similarly, subsection (4) requires a brake for the power driving wheel of a locomotive, together with appliances for operation of the train brake system. *Id.*

By contrast, the Act's requirements for "power or train brakes" apply to a "train". 49 U.S.C. § 20302(a)(5).

This distinction was recognized by the district judge in this case on the day he entered summary judgment on Phillips' behalf. See App. C, pp. 13a-14a. Nevertheless, the Fourth Circuit failed to even acknowledge the distinction, except in a footnote which incorrectly summarized more than eighty years of opinions from this Court. See App. A, p. 8a, n.3. The court's footnote observed incorrectly that:

> In *Erie Railroad Co.*, the Supreme Court seemed to indicate in *dicta* that the FSAA's automatic coupler and grab iron requirements apply more broadly than the Act's air brake provision, *United States v. Erie R.R.*, 237 U.S. 402 (1915) at 848 . . . However later opinions did not recognize such a distinction. *Id.*

This conclusion simply does not stand up even under the most causal examination of *Erie* and other decisions of this Court.

To begin with, *Erie* was not exclusively an air brake case. The trial court proceedings in *Erie* involved a total of 26 counts, including defective couplers, grab irons, handholds and air brakes. 237 U.S. 402 at 403. The case was an early action to enforce a civil penalty for violation of the SAA and this Court applied the Act to all of the alleged violations, not simply air brakes. 237 U.S. at 409. Disposing of the defendant's contention that air brake requirements of the Act do not apply to what it termed "switching operations", the Court specifically noted:

> It will be pereived that the air brake provision deals with *running a train*, while the other requirements relate to *hauling or using a car*. In one, a train is the unit and in the other a car. As the context shows, a train in the sense intended, consists of an engine and cars which have been assembled and coupled together for a run or trip along the road. When a train is thus made up and is proceeding on its journey it is within the operation of the air-brake provision. But it is otherwise with the various movements in railroad yards whereby cars are assembled and coupled into outgoing trains and whereby incoming trains which have completed their run are broken up. These are not train movements but mere switching operations, and so are not within *the air-brake provision*. 237 U.S. 402 at 408. Emphasis added.

With reference to the other safety appliances at issue in the appeal, the Court continued:

> The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements, for both involve a hauling or using of cars. *Id.* Citations omitted.

Two points, ignored by the court of appeals, bear special emphasis here. First, the above language was not *dictum*. The language applied directly to safety appliances at issue in the appeal. Second, by 1915 when *Erie* was decided, the distinction between air brakes and other safety appliances was firmly established in the decisional law of this and other federal courts. Accordingly, the conclusions in the Fourth Circuit's footnote are simply incorrect.

Erie relied on a long line of cases that recognize the statute's definitional distinction between "trains" and "cars".

For example, in *Johnson v. Southern Pacific Co.*, 196 U.S. 1 (1904), the Supreme Court easily treated the Act's requirement for automatic couplers as applicable to a locomotive and tender by applying the clear language of the Act itself. *Id.* In 1908, this Court reached a similar conclusion in *St. Louis & Iron Mountain Ry. v. Taylor, supra,* in which it specifically noted:

> We have nothing to do but ascertain and declare the meaning of a few simple words in which the duty [to supply drawbars of uniform height] is described. It is enacted that "no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard." There is no escape from the meaning of these words. Exception cannot clairify them, and ought not to be employed to confuse them or lessen their significance . . . if the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. 210 U.S. 281 at 294-295.

By the time of its 1916 *Erie* decision, the Supreme Court also had easily applied car specific requirements to cars used *in switching operations*. See, e.g., *Johnson*

v. Southern Pacific Co., supra; Minn. & St. Paul Ry. v. Popplar, supra; Delk v. St. Louis & San Francisco R.R., supra; Southern Railway v. Crockett; Southern Railway v. United States, supra; and *Texas & Pacific Railway Co. v. Rigsby, supra.*

By contrast, *Erie* and the later opinions that the Fourth Circuit believed did not recognize a distinction between power brakes and other safety appliances, dealt with the narrow question of what constituted a "train" or "train movement" for purposes of enforcing SAA train brake requirements. In *Erie*, it was a subsumed question in the broader appeal. In later cases, it was more distinct.

This statutory distinction has been reviewed by the United States Supreme Court as recently as 1959. See, e.g., *United States v. Seaboard Airline Railroad Co.*, 361 78 (1959). Noting that, "the meaning of the words 'train' as used in the Act has been before the Court four times", the *Seaboard* Court observed the difficulty that courts sometimes have in determining whether a collection of cars constitute a train. In this context alone, the Supreme Court has noted that cars engaged in switching operations do not fall within the ambit of the Safety Appliance Act.

The distinction is based on the plain language of the statute itself and the SAA's stated restriction that train brake requirements apply only to "trains". Nothing in either the statute or decisional law has ever been used to narrow the Act's requirements for other safety appliances. *Seaboard, supra,* citing *United States v. Erie R. Co., supra*: *United States v. Chicago, B. & Q. R. Co.*, 237 U.S. 410 (1915); and, *Louisville & J. Bridge Co. v. United States*, 249 U.S. 534 (1919). Nothing in either the statute nor these cases remotely supports the defendant's contention below that the Act's requirement for other safety appli-

ances does not apply to switching operations. This incorrect argument, accepted by the Fourth Circuit initially in *Deans* and extended to the present case, is at the heart of this appeal.[3]

III. AN EVOLVING LINE OF AUTHORITY FROM THE FOURTH CIRCUIT IMPROPERLY RESTRICTS APPLICATION OF THE SAA TO A NARROWLY DEFINED AND FACT SPECIFIC TEST OF WHETHER THE CAR IS "IN USE"

A. *Deans v. CSX Transportation, Inc.*

While Phillips case was on appeal, the Fourth Circuit announced a vague fact driven approach to determining whether a car was "in use" at the time of a safety appliance injury. From at least the early 1900's, this Court has been consistent in recognizing that cars are "in use" unless expressly withdrawn from service. As discussed earlier, the "in use" requirement is satisfied, unless a car has been withdrawn from service for purposes of repair. The rule is broad enough to cover cars which are motionless at the time of the injury, defective cars being moved to a repair facility, and railroad employees whose duties specifically include making an inspection to determine the existence of a defect, See e.g., *Brady v. Terminal R.R. Assn., supra.* Nevertheless, the *Deans* Court resorted to a needlessly exacting examination of the plaintiff's activities at the time of his injury.

Deans was a CSX conductor injured by a defective handbrake. 152 F.3d 326 at 328. At the time of his injuries, he and his train crew were beginning a trip from Grafon, West Virginia to Cumberland, Maryland. *Id.* Before the train could leave, however, Deans was required

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[3] It is significant to note that both *Deans* and *Phillips* were Maryland Fourth Circuit cases against the same defendant, represented by the same defense counsel. Similarly, Circuit Judge Williams participated in each appeal.

to couple the engines to the rail cars, release several handbrakes, and conduct a "predeparture air brake test". *Id.* He was injured in this process when a handbrake failed to release. *Id.*

The district court granted summary judgment to Deans, concluding that the handbrake failure violated the FSAA. CSX appealed, claiming that the Act's "in use" requirements had not been met.

It is significant to note that the *Deans* opinion analyzes the failure of the handbrake not from the standpoint of whether the *car* was in use but whether the *train* was in use at the time of the injury. 152 F.3d 326 at 328-329. Contrary to the Act's express language, the *Deans* Court noted that, "[a]bsolute liability under the Act only attaches, however, if the *train* is "in use" at the time of the accident" *Id.* Emphasis added. This incorrect conclusion stands in stark contrast to the unambiguous language of 49 U.S.C. § 20302(a) which, in fact, reads:

> A railroad carrier may use or allow to be used on any of its railroad lines—
>
> (1) *a vehicle* only if it is equipped—
>
> * * * *
>
> (B) secure sill steps and efficient handbrakes. Emphasis added.

As demonstrated earlier, the term "vehicle" is statutorily defined as, "a car, locomotive, tender, or similar vehicle. 49 U.S.C. § 20301(a).

Having incorrectly formulated the question, the Fourth Circuit then proceeded to an analysis of whether Deans' *train* was "in use" at the time of his injury, observing, "[o]ne might think that determining whether a train is "in use" would be a fairly straightforward exercise. In actual practice, however, it is anything but clear where to

draw the line for purposes of the FSAA". 152 F.3d 326 at 329. The Fourth Circuit then distinguished *Deans* from a recently decided Fifth Circuit case that also involved a pre-departure brake inspection. See, *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991). The *Deans* court failed to acknowledge, however, that *Trinidad* involved air brake provisions of the Safety Appliance Act and that appliance's unique application to *trains* as opposed to *cars*.

In *Deans*, the error was harmless because the Fourth Circuit concluded that Deans' train was in use at the time of his injury. This analytical error was extended to the current case, but this time was fatal.

B. *Phillips v. CSX Transportation, Inc.*

In proceedings below the Fourt Circuit began its discussion of FSAA grab iron requirements by returning to *Trinidad's* analysis of air brake requirements, in part, using that case to conclude that, "the FSAA does not apply to train cars involved in switching operations". App. A., p. 8a.

Again, without acknowledging the distinction between grab irons and train brakes, the Fourth Circuit observed, "determining the point at which switching operations end and a train becomes 'in use' is the key issue in this case". *Id.* The court of appeals then repeated the error it had committed in *Deans* and incorrectly concluded that, "the Fifth Circuit addressed this exact issue in *Trinidad v. Southern Pacific Transportation Co.*" *Id.* Rejecting what it called *Trinidad's* "bright line test to determine when a train has completed switching operations and is in use", the Fourth Circuit continued by articulating its own fact driven "in use" test. App. A, pp. 8a-9a.

Of the various factors considered by the court, it considered the most important to be, "where the train was

located at the time of the accident and the activity of the injured party". *Id.* By doing so, the court ignored more than eighty years of Supreme Court precedent that had never placed such a stringent requirement on application of the Act. The error, and its source, are clearly rooted in the Fourth Circuit's failure to distinguish between the different treatment accorded under the FSAA to train brakes and other safety appliances. The court's failure to acknowledge that train brake requirements apply to "trains" while other safety appliance requirements pertain to "vehicles", easily explains the court's incorrect conclusion that the Safety Appliance Act, "does not apply to train cars involved in switching operations". App. A, p. 8a. Although the court's statement is clearly correct as it applies to air brakes, it is categorically wrong when applied to other safety appliances, including the grab irons and handholds involved in this case.

It is not surprising that the railroad would insist upon this novel limitation to the Safety Appliance Act. After all, even a cursory examination of FSAA decisions reveals a century of industry resistance to its application and enforcement. The court of appeals' decision in this case, however, heralds a new day for railroad workplace safety and rail safety in general. The "in use" requirement as newly defined by the Fourth Circuit denies railroad workers engaged in switching operations the precise protections Congress intended in 1893.

In so doing, the Fourth Circuit has elevated protection of the railroad above protection of rail workers, the class of persons this statute was intended to protect. That this judicial judgment has been substituted for congressional intent is clear from the opinion itself: "the purpose of the "in use" limitation is to give rail car operators the opportunity to inspect for any correct safety appliance defects *before the FSAA exposes the operators to strict liability*

for such defects". App. A, p. 7a. Emphasis added. This judicial gloss which has no basis either in the statute or in decisional law from this Court, turns the real intent of the Safety Appliance Act on its head. It simply cannot be reconciled with the congressionally stated purpose of the Act ("to promote the safety of employees and travelers upon railroads"), or this Court's frequently repeated recognition that the statute is remedial and should be liberally construed to protect railroad workers and the public at large. *H. Rep., supra*; *Brady v. Terminal R.R. Assn., supra,* and many other cases.

Although railroads and even the court of appeals may be dissatisfied with the strict liability sometimes imposed by the FSAA, the prerogative to change the statute belongs uniquely to the United States Congress. This is particularly so because the Safety Appliance Act has become deeply imbedded in the compensation system for railroad workers. These men and women are not covered under state worker's compensation laws. Without the FSAA's no-fault provisions, they will be required to demonstrate employer malfeasance in a large category of injuries, which for eighty years have been compensated irrespective of carrier fault. This result is directly contrary to case after case in which this Court has observed that for injuries caused by defective safety appliances, the railroad's, "negligence is immaterial, since the statute imposes an absolute and unqualified duty to maintain the appliance in secure condition. *Texas & Pacific Ry. v. Rigsby*, 241 U.S. 33 at 43, citing *St. Louis & Iron Mountain Ry. v. Taylor, supra; Chicago B. & Q. Ry. v. United States, supra; Delk v. St. Louis & San Francisco R.R., supra.*

Finally, by relieving railroads from the necessity of complying with the FSAA during switching operations, the Fourth Circuit has endangered the public at large. Although Mr. Phillips was injured by a defective grab iron,

there is absolutely no limitation in the lower court's reasoning restricting it to this safety appliance. To the contrary the court's language is expansive and its rationale applies equally to automatic couplers, draw bars, handbrakes, locomotive brakes and locomotive appliances for operating the train brake system. Armed with the court of appeals' decision in this case, railroads are free to conduct switching operations without regard to whether their cars will couple automatically on contact, remain coupled, or can be stopped once they begin to roll. The public danger in such a result is manifest. The logical extension of this opinion is a complete repudiation of Congress' overriding intent to require basic safety equipment for use in the coupling and braking of cars.

The Fourth Circuit's opinion must be reversed.

IV. THE COURT OF APPEALS IMPROPERLY ENTERED FINAL JUDGMENT ON BEHALF OF THE RAILROAD

As demonstrated amply, the Fourth Circuit's decision in this case is a gross departure from existing safety appliance law. When Phillips abandoned his fault-based claims under the Federal Employer's Liability Act, he relied upon almost nine decades of fully developed and well-settled law applying the FSAA to switching operations. The first suggestion that the Fourth Circuit was dissatisfied with almost a century of precedent was its decision in *Deans v. CSX Transportation*, a case decided while Phillips' case was on appeal, and two years after he had prevailed on his summary judgment. Nothing in earlier case law suggested that the court would not apply the Act to switching operations.

Even if this court were to conclude that the Fourth Cir-Cuit's view is a judicially justified limitation on the Safety Appliance Act, fundamental fairness requires that Phil-

lips be given the opportunity to reopen his FELA claims which were abandoned, among other reasons, for purposes of economy in the district court.

Petitioner believes that the decision below is wrongly decided. Nevertheless, if the Fourth Circuit's principal opinion is affirmed, Mr. Phillips respectfully moves this Court to reverse the decision below and remand the case to the district court for further proceedings under 45 U.S.C. § 51, et seq. as amended.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 5, 2000

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2669

JEFFREY D. PHILLIPS,
Plaintiff-Appellant,

v.

CSX TRANSPORTATION, INCORPORATED,
Defendant-Appellee,

and

CSX TRANSPORTATION, INCORPORATED,
Defendant & Third Party Plaintiff,

and

PROCOR ALBERTA, INCORPORATED;
FALCONBRIDGE, LIMITED;
UNION TANK CAR COMPANY,
Third Party Defendants

No. 97-2750

JEFFREY D. PHILLIPS,
Plaintiff-Appellee,

v.

CSX TRANSPORTATION, INCORPORATED,
Defendant-Appellant,

and

CSX TRANSPORTATION, INCORPORATED,
Defendant &
Third Party Plaintiff,

and

PROCOR ALBERTA, INCORPORATED;
FALCONBRIDGE, LIMITED;
UNION TANK CAR COMPANY,
Third Party Defendants.

Appeals from the United States District Court
for the District of Maryland, at Baltimore
Marvin J. Garbis, District Judge
(CA-95-2000-MJG)

Argued: March 4, 1999

Decided: September 3, 1999

Before NIEMEYER and WILLIAMS, Circuit Judges, and SMITH, United States District Judge for the Eastern District of Virginia, sitting by designation.

OPINION

PER CURIAM:

This case involves a suit under the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §§ 51-60, based on a

violation of the Federal Safety Appliance Act ("FSAA"), 49 U.S.C. §§ 20301-06. The district court granted summary judgment in favor of Jeffrey Phillips, holding that CSX Transportation violated the FSAA and was strictly liable for the injury that Phillips sustained as a result of the violation. In light of our decision in *Deans v. CSX Transportation, Inc.*, 152 F.3d 326 (4th Cir. 1998), we find that the FSAA did not apply under the circumstances of Phillips's injury, and we reverse the district court's summary judgment order and grant summary judgment in favor of CSX.

I.

On July 20, 1994, Jeffrey Phillips was injured while performing his duties as a brakeman for CSX Transportation. At the time of his injury, Phillips was the foreman of a yard crew engaged in normal train switching operations at CSX's Cumberland Yard in Cumberland, Maryland. Such operations consist of taking arriving trains apart, and putting departing trains together.

The normal procedure when a train arrives at the yard is for the yard crew to disconnect all of the train's cars from one another, and to turn the cars over to the car department for a mechanical inspection. As part of its inspection, the car department checks the cars' safety appliances. If the car department discovers any defects during this inspection, it sets the defective cars aside for repair. Once the mechanical inspection is complete, the car department turns the cars back over to the yard crew. The yard crew than assembles the cars into new trains for departure. However, before a train may depart, it must undergo a predeparture inspection, which the car department also conducts. The yard crew engages the handbrakes on the cars in an assembled train, detaches the engine, and then turns the train over to the car department

for the predeparture inspection. The car department inspects the train's air brakes, and again checks its safety appliances. Once the predeparture inspection is complete, the car depatment turns the train over to the transportation crew, and the train departs.

Phillips was injured while he was engaging the handbrakes on a completed train, prior to turning over to the car department for its predeparture inspection. The train upon which he was working was sitting on a yard track. Phillips had set the handbrakes on three of the cars in the train, and he was climbing onto a fourth car when the handrail he was using to pull himself up gave way, causing him to fall and injure his back.

Phillips filed suit against CSX on July 7, 1995. His complaint alleged two bases for CSX's liability under FELA: 1) negligence on the part of CSX for failing to maintain a safe workplace; and 2) strict liability for CSX's failure to comply with the FSAA. The parties filed cross-motions for summary judgment on the FSAA claim. On August 6, 1996, the district court granted summary judgment in favor of Phillips on the issue of CSX's liability for violating the FSAA. Following the court's summary judgment order, Phillips abandoned his negligence claim, and proceeded to trial only on the question of damages pursuant to his FSAA claim. On August 23, 1996, the jury awarded Phillips $444,650. However, on April 25, 1997, the district court granted CSX's motion to reduce the damage award as a matter of law because Phillips's evidence of future economic loss and future medical expenses was too speculative, and his award for past economic loss failed to take into account Medicare and railroad retirement payroll deductions. Phillips's award was reduced to $76,533.54.

Phillips appeals the district court's reduction of damages, and CSX appeals the court's summary judgment order on the FSAA claim. Since we find that the district court erred in granting summary judgment in favor of Phillips and not in favor of CSX, the reduction of damages issue is moot.

II.

A.

This court reviews *de novo* a district court's order granting summary judgment. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only when the court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds that there is no genuine issue of material fact and that the moving part is entitled to judgment as a matter of law. Fed. R. Civ. 56(c); *see, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Terry's Floor Fashions, Inc. v. Burlington Indus.*, 763 F.2d 604, 610 (4th Cir. 1985). A mere "scintilla of evidence" is not sufficient to withstand a motion for summary judgment. Rather, the evidence must be such that the jury reasonably could find for the nonmoving party. *Anderson*, 477 U.S. at 252. The court must draw all justifiable inferences in favor of the nonmoving party. *Id.* at 255.

B.

The FSAA imposes a number of safety requirements on railroads.[1] It is unlawful under the Act for a railroad

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[1] Although the 1994 Federal Railroad Safety Authorization Act recodified the FSAA, the Railroad Safety Authorization Act's legislative history clearly demonstrates that the substantive provisions of the FSAA remain unchanged. *See* S. Rep. No. 103-265, at 1

to use railcars that are not equipped with certain mandated safety features, including automatic couplers, handbrakes, and secure steps, ladders, and running boards. 49 U.S.C. § 20302(a). In this case, the relevant requirement is that railcars be "equipped with secure grab irons or handholds on its ends and sides." *Id.* at § 20302(a)(2).

The FSAA does not create an independent cause of action for those injured because of a violation of the Act. *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 166 (1969). However, for railroad employees injured because of a FSAA violation, FELA provides the cause of action. *Id.* Moreover, a FSAA violation is *per se* negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation. *Id.; O'Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390-91 (1949); *Deans v. CSX Transp., Inc.*, 152 F.3d 326, 328 (4th Cir. 1998). However, the FSAA's requirements apply to only railcars that are actually "in use." *Brady v. Terminal R.R. Assn.*, 303 U.S. 10, 13 (1938); *United States v. Northern Pac. Ry.*, 254 U.S. 251, 254-55 (1920);

(1994) ("The purpose of [the Railroad Safety Authorization Act] is to restate in comprehensive form, *without substantive change*, certain general and permanent laws related to transportation . . . ." (emphasis added)); *id.* at 5 ("[T]his bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear might have some weight if this were the usual kind of amendatory legislation when it can be inferred that a change of language is intended to change substance. In codification law, however, the courts uphold the contrary presumption: the law is intended to remain substantively unchanged."). Thus, pre-1994 caselaw interpreting the FSAA applies with equal force to the current codification.

Deans, 152 F.3d at 328. As we have observed previously, the purpose of the "in use" limitation is to give railcar operators the opportunity to inspect for and correct safety appliance defects before the FSAA exposes the operators to strict liability for such defects. *See Angell v. Chesapeake & Ohio Ry. Co.*, 618 F.2d 260, 262 (4th Cir. 1980) ("[T]he intent of the statute is to exclude from its coverage only such functions as are necessary to detect and correct those defective conditions for which absolute liability will be imposed.").[2] Whether a train is "in use," for purposes of the FSAA, is a question of law for the court to decide. *Deans*, 152 F.3d at 329.

Since Congress enacted the FSAA, the federal courts have attempted to define the outer limits of its applicability. The Act applies more broadly than simply to trains en route from their origin to their destination on main line rtacks. For example, a transfer train moving on a short connecting track from one train yard to another still must satisfy the FSAA's requirements. *See, e.g., United States v. Seaboard Air Line R.R. Co.*, 361 U.S. 78, 81-83 (1959); *Northern Pac. Ry.*, 254 U.S. at 254-55; *Louisville & Jeffersonville Bridge Co. v. United States*, 249 U.S. 534, 538-40 (1919); *United States v. Chicago, Burlington & Quincy R.R. Co.*, 237 U.S. 410, 412-13 (1915); *United States v. Erie R.R. Co.*, 237 U.S. 402, 408-09 (1915). Moreover, a train that has reached its destination, but has not yet been turned over to the yard receiving it, is still "in use" under the FSAA. *Brady*,

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[2] *Angell* actually involved the Boiler Inspection Act, 49 U.S.C. §§ 20701-20703. However, because the "in use" language in the Boiler Inspection Act is identical to the language in the FSAA, courts have applied caselaw interpreting the Boiler Inspection Act to the FSAA, as well. *See, e.g., Deans*, 152 F.3d at 329 (citing *Angell*); *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 189 (5th Cir. 1991) (same).

303 U.S. at 13-14. However, the FSAA does not apply to train cars involved in switching operations. *Seabord Air Line R.R. Co.*, 361 U.S. at 80; *Northern Pac. Ry.*, 254 U.S. at 254; *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187, 188-89 (5th Cir. 1991).[3] Determining the point at which switching operations end and a train becomes "in use" is the key issue in this case.

The Fifth Circuit addresed this exact issue in *Trinidad v. Southern Pacific Transportation Co.*, 949 F.2d 187 (5th Cir. 1991). In *Trinidad*, the plaintiff was hurt while performing an air brake inspection immediately prior to the departure of a train. The court articulated a bright-line test to determine when a train has completed switching operations and is in use, stating that a train is not in use until it is fully assembled and the crew has completed their predeparture inspection. *Id.* at 189. However, rather than adopt the Fifth Circuit's approach, we recently established our own standard for determining whether a railcar is in use in *Deans v. CSX Transportation, Inc.*, 152 F.3d 326 (4th Cir. 1998). In *Deans*, we rejected the *Trinidad* bright-line test. *Id.* at 329. Instead,

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[3] In *Erie Railroad Co.*, the Supreme Court seemed to indicate in dicta that the FSAA's automatic coupler and grab iron requirements apply more broadly than the Act's air brake provision. *Erie R.R. Co.*, 237 U.S. at 408 ("[Assembling and breaking-up trains] are not train movements but mere switching operations, and so are not within the air-brake provision. The other provisions calling for automatic couplers and grab irons are of broader application and embrace switching operations as well as train movements . . . ."). However, later opinions did not recognize such a distinction. *See, e.g., Seaboard Air Line R.R. Co.*, 361 U.S. at 80 (citing *Erie Railroad Co.* for the proposition that "switching operations' [are] not 'train' movements within the meaning of the [FSAA]"); *Northern Pac. Ry. Co.*, 254 U.S. at 254 ("A moving locomotive with cars attached is without the provision of the [FSAA] only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains.").

to establish whether a railcar is "in use," a court must look at "a number of different factors," the most important of which are "where the train was located at the time of the accident and the activity of the injured party." *Id.* Based upon this standard, we held that a train that "already had its engine coupled to it and was standing on a track in the rail yard in preparation for imminent departure—not in storage or waiting to be moved into a repair location"—was in use. *Id.* We additionally noted that the injured employee was part of the train's transportation crew, and that at the time of his injury, he was in the process of releasing the handbrakes to put the train in motion. *Id.* The fact that the predeparture air brake test had not yet been completed was not dispositive. *Id.*

In the present case, when the district court granted summary judgment in favor of Phillips on the issue of CSX's liability for its FSAA violation, it did not have the benefit of the *Deans* holding to guide its decision. Therefore, we must reconsider the facts in this case in light of *Deans*. We find that this case differs significantly from *Deans* with respect to the two *Deans* factors. While in both cases the trains were assembled and sitting in the yard, the train in *Deans* was undergoing its predeparture inspection, it was coupled to its enginee, its handbrakes were being released, and its departure was "imminent." *Deans*, 152 F.2d at 30. In this case, on the other hand, the train was about to be uncoupled from its engine, its handbrakes were being engaged, and it had yet to undergo its predeparture inspection. Moreover, the plaintiff in *Deans* and Phillips in this case were engaged in very different activities at the time of their injuries. The plaintiff in *Deans* was a member of the train's transportation crew, whereas Phillips was a member of the Cumberland yard crew. Phillips's responsibilities were limited to switching operations. Plus, the plaintiff in *Deans* was in-

jured while releasing the train's handbrakes, while Phillips was hurt while engaging his train's handbrakes to prevent it from moving. Finally, in *Deans* we emphasized the fact that the plaintiff could have released the handbrakes after the predeparture inspection, in conjunction with the departure of the train. *Id.* at 329. In this case, Phillips had to engage the handbrakes prior to the preedeparture inspection, in conjunction with the assembly of the train. Taken together, the facts in this case show that Phillips was injured at the end of the switching process, rather than at the beginning of the departure process.[4] Thus, in accordance with *Deans* and Supreme Court precedent, we hold that the train upon which Phillips was injured was not "in use" at the time of his injury, and summary judgment in favor of CSX, rather than Phillips, on the FSAA claim is the proper result. Accordingly, we reverse the district court's summary judgment order in favor of Phillips, and grant summary judgment in favor of CSX.

III.

As indicated above, following the district court's summary judgment order, Phillips abandoned his negligence claim under FELA. Accordingly, now that we have granted summary judgment in favor of CSX on Phillips's FSAA claim, Phillips has no remaining basis to recover any damages from CSX. Therefore, the district court's downward adjustments to Phillips's damage award are moot.

---

4 Phillips, himself, stated in an affidavit filed with the district court that switching operations are not complete until a train is fully assembled. its handbrakes are set, and it is turned over to the car department for the pre-departure inspection. J.A. at 646 (stating that, at the time of his injury, he and his crew "had not finished our switching work").

IV.

For the reasons stated above, we reverse the district court's summary judgment order, and grant summary judgment in favor of CSX as to CSX's liability under the FSAA.

REVERSED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. MJG-95-2000

JEFFREY D. PHILLIPS,
Plaintiff

vs.

CSX TRANSPORTATION, INC.,
Defendant

ORDER

For the reasons stated on the record of proceedings held in this matter on August 6, 1996.

1. Plaintiff's Motion for Partial Summary Judgment is GRANTED.
2. Defendant CFX Transportation, Inc.'s Motion For Partial Summary Judgment Re: Federal Safety Appliance Act Claim is DENIED.
3. Plaintiff shall decide, by the pretrial conference whether to dismiss or proceed on his negligence based claim.
4. Plaintiff's Motion For Continuance is DENIED.
5. The pretrial conference shall be held in Chambers on Tuesday, August 13 at 1:00 p.m.

SO ORDERED this 6th day of August, 1996.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

Chambers of
Marvin J. Garbis
U. S. District Judge
U. S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2691

Telephone: 410 962-9090

August 6, 1996

TO ALL COUNSEL OF RECORD

Re: Jeffrey D. Phillips v.
CSX Transportation, Inc., et al.
Civil Action No. MJG-95-2000

Dear Counsel:

In reviewing the materials relevant to this case, the Court has noted that the Safety Appliance Act, 45 U.S.C. §§ 1-16, was amended and recodified in 49 U.S.C. §§ 20301-20306 effective July 5, 1994. Since the events in question occurred on July 20, 1994, it appears that the new statute will govern this dispute. Although the new statute may have the same effect as the old, counsel should be ready to discuss whether any changes will affect the outcome of the instant case.

In addition, *Trinidad v. Southern Pac. Transp. Co.*, 949 F.2d 187 (5th Cir. 1991), involved the appplication of the brake provisions of the FSAA, 45 U.S.C. § 1 & 9. It appears that courts have found that these brake sections do not apply to *cars* engaged in switching operations prior to the time a *train* is formed. *See Trinidad*, 949 F.2d at

188-89. Rather, courts have found a distinction between "switching movements" and "train movements," with the brake provisions applying only to the latter. *See United States v. Erie R.R. Co.*, 237 U.S. 402, 407 (1915). The grab irons provision, the old § 4 and the new § 20302 (a)(2), however, clearly state that they are intended to protect individuals engaged in the coupling and uncoupling of *cars* not to cars only when part of an assembled train. Moreover, other courts have found that the grab irons section applies to switching operations when the brake provisions would not be applicable. *See United States v. Erie R.R. Co.*, 237 U.S. 402, 407 (1915); *Blazin v. Southern Pac. Co.*, 127 F. Supp. 20, 21 (N.D. Cal 1954).

Counsel should be prepared to address these matters at argument.

Yours truly,

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRIC OF MARYLAND NORTHERN DIVISION

Case No: MJG-95-2000

JEFFREY D. PHILLIPS,

Plaintiff

v.

CSX TRANSPORTATION, INC.,

Defendant

AMENDED JUDGMENT

This action came on for trial before the Court and a jury, Honorable Marvin J. Garbis, United States District Judge presiding. After the presentation of evidence, argument and the Court's charge to the jury, a Special Verdict Form was submitted to the jury for their consideration and a verdict was duly rendered on August 23, 1996. On April 29, 1997, the Court issued its Memorandum and Order granting post trial motions filed by the Defendant. Thereafter, the third party litigation was resolved among the parties.

Judgment was issued by the Court on November 3, 1997. Thereafter, the parties timely filed a Joint Motion to Alter or Amend the Judgment of November 3, pursuant to Federal Rule of Civil Procedure 59(e). Accordingly,

1. This Court's November 3, 1997 Judgment is hereby amended.

2. Judgment shall be, and hereby is, entered in favor of Plaintiff Jeffery D. Phillips and against Defendant, CSX Transportation, Inc., as follows:

   a. Defendant shall pay Plaintiff Jeffery D. Phillips the total of $76,533.54.

   b. Defendant shall pay the Railroad Retirement Board for the account of Jeffery D. Phillips the total of $1,463.93.

   c. Defendant shall pay for three months of Plaintiff's medical care by Charles Narrow, M.D.

3. Plaintiff shall receive his assessable costs of this action.

4. All third party claims are dismissed without prejudice, the parties thereto to bear their own respective costs.

5. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

6. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

7. For purposes of Rule 4 of the Federal Rules of Appellate Procedure this order shall be deemed to dispose of the parties' joint motion under Rule 52(b).

SO ORDERED, this 10th day of November, 1997.

/s/ Marvin J. Garbis
MARVIN J. GARBIS
United States District Judge

APPENDIX E

FILED October 8, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 97-2669
CA-95-2000-MJG

JEFFREY D. PHILLIPS,
Plaintiff-Appellant

v.

CSX TRANSPORTATION, INCORPORATED,
Defendant-Appellee

and

CSX TRANSPORTATION, INCORPORATED,
Defendant & Third Party Plaintiff

and

PROCOR ALBERTA, INCORPORATED;
FALCONBRIDGE, LIMITED;
UNION TANK CAR COMPANY,
Third Party Defendants

No. 97-2750
CA-95-2000-MJG

JEFFREY D. PHILLIPS,
Plaintiff-Appellee

v.

CSX TRANSPORTATION, INCORPORATED,
Defendant-Appellant

and

CSX TRANSPORTATION, INCORPORATED,
Defendant & Third Party Plaintiff

and

PROCOR ALBERTA, INCORPORATED;
FALCONBRIDGE, LIMITED;
UNION TANK CAR COMPANY,
Third Party Defendants

ON PETITION FOR REHEARING
AND REHEARING EN BANC

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
Clerk

APPENDIX F

PERTINENT TEXT OF STATUTES INVOLVED IN THIS CASE

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directy or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * * *

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

* * * *

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts

* * * *

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

* * * *

49 U.S.C. § 20301. Definition and nonapplication

* * * *

(a) Definition. In this chapter [49 USC §§ 20301 et seq.], "vehicle" means a car, locomotive, tender, or similar vehicle.

* * * *

49 U.S.C. § 20302. General requirements

(a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines—

(1) a vehicle only if it is equipped with—

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretry of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if—

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity

of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

Former 45 U.S.C. § 4. Grab irons or handholds for security in coupling and uncoupling cars

Until otherwise ordered by the Secretary of Transportation, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

Former 45 U.S.C. § 6. Failure to equip cars as provided; duty of United States attorneys and Secretary of Transportation; exceptions from operation of provisions

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1 to 7 of this title, shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered in a suit or suits to be brough by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office; and it shall be the duty of such

United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Secretary of Transportation to lodge with the proper United States attorneys information of any such violations as may come to his knowledge:

* * * *

Former 45 U.S.C. § 9. Power or train brakes; operation by engineer; rules for installation, inspection maintenance, and repair

Whenever, as provided in sections 1 to 7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated;

* * * *

(2)

No. 99-1136

Supreme Court, U.S.
FILED
FEB 4
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

JEFFREY D. PHILLIPS,

Petitioner,

v.

CSX TRANSPORTATION, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. WHETHER THE FOURTH CIRCUIT, IN ACCORD WITH THE PLAIN LANGUAGE OF THE RELEVANT STATUTE, AND PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS, CORRECTLY HELD THAT THE SAFETY APPLIANCE ACT DID NOT APPLY TO A RAILCAR BEING ASSEMBLED INTO A NEW TRAIN.

2. WHETHER PHILLIPS HAS WAIVED HIS RIGHT TO A TRIAL OF HIS FORMERLY ABANDONED NEGLIGENCE CLAIMS.

PARTIES TO THE PROCEEDINGS

Petitioner Jeffrey D. Phillips ("Phillips") and Respondent CSX Transportation, Inc. ("CSXT") are the sole parties to this proceeding.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

PARTIES TO THE PROCEEDINGS..... ii

TABLE OF AUTHORITIES..... iii

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE PETITION..... 5

I. THE FOURTH CIRCUIT, IN ACCORD WITH THE PLAIN LANGUAGE OF THE RELEVANT STATUTE, AND PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS, CORRECTLY HELD THAT THE SAFETY APPLIANCE DID NOT APPLY TO A RAILCAR BEING ASSEMBED INTO A NEW TRAIN..... 5

II. PHILLIPS HAS WAIVED HIS RIGHT TO A TRIAL OF HIS FORMERLY ABANDONED NEGLIGENCE CLAIMS..... 13

CONCLUSION..... 15

APPENDIX OF PERTINENT STATUTES..... App. 1-6

TABLE OF AUTHORITIES

CASES **Page**

Brady v. Terminal Ass'n. of St. Louis, 303 U.S. 10 (1938)..... 6, 7, 11

Chicago B&O R. Co. v. United States, 220 U.S. 559 (1911)..... 8

Chicago Junction Ry. v. King, 222 U.S. 222 (1911)..... 8

Deans v. CSX Transportation, Inc., 152 F.3d 326 (4th Cir., 1998)..... 6, 11

Delk v. St. Louis & S.F.R. Co., 220 U.S. 580 (1911)..... 8

Estes v. Southern Pacific Transp. Co., 598 F.2d 1195 (10th Cir., 1979)..... 11

Great Northern R. Co. v. Otos, 239 U.S. 349 (1915)..... 9

Johnson v. Southern Ry. Co., 196 U.S. 1 (1904)..... 8

Minneapolis St. P. & St. Ste. M.R. Co. v. Popplar, 237 U.S. 369 (1914)... 8

Morris v. CSX Transp., Inc., 481 S.E.2nd 585 (Ga. App. 1997)..... 11

Norfolk & Western Railway v. Hiles,
516 U.S. 400 (1995)..... 12

San Antonio Ry. v. Wagner,
241 U.S. 476 (1916)..... 9

Schlemmer v. Buffalo R. & P.R. Co.,
205 U.S. 1 (1907)..... 8

Southern R. Co. v. Crockett,
234 U.S. 725 (1914)..... 8

Southern R. Co. v. United States,
222 U.S. 20 (1911)..... 8

St. Louis I.M. & S.R. Co. v. Taylor,
210 U.S. 281 (1908)..... 8

Texas & Pacific Railway Company v. Rigsby, 241 U.S. 33 (1916)..... 10, 11, 12

Trinidad v. Southern Pacific Transp. Co., 949 F.2d 187 (5th Cir., 1991)..... 11

United States v. Erie Railroad Company,
237 U.S. 402 (1915)..... 7, 9

STATUTES

Safety Appliance Act, 49 U.S.C. 20301..... 5, *passim*

OTHER AUTHORITIES

Black's Law Dictionary, Deluxe 7th Ed. (West Group, 1999)..... 12

No. 99-1136

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1999

JEFFREY D. PHILLIPS,

Petitioner

v.

CSX TRANSPORTATION, INC.,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent CSX Transportation, Inc. respectfully prays that Mr. Phillips' Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

STATEMENT OF THE CASE

The railroad has no dispute with Phillips' recitation of the proceedings below. The railroad does object to Phillips' arguing his case at Pet. 3-4.

More significantly, the record refutes some of the "additional facts" submitted by Phillips at Pet. 6. Phillips there claims that the "yard track" where Phillips was working was not a storage track. Phillips' sworn deposition testimony, part of the record before the Fourth Circuit, belies this contention:

> Q. What occurs on two receiving, what happens on that track?
>
> A. Inbound trains are, are stored there until they can be humped, outbound trains are stored there until the power [road engine] can be put on and the air tested ready for the outbound crew.

Phillips' Depo., p. 17, lines 6-11, (emphasis supplied).

The Affidavit of Phillps' co-worker, car inspector Kenneth Hogan, further emphasized the fact that Phillips' yard crew performed its work well before the railcar and train would be "in use", as required for application of the Safety Appliance Act (SAA), as explained by the Fourth Circuit. Hogan stated in part that "at no time is this test [the initial terminal brake test and rear car test] allowed to begin until the train crew [Phillips' yard crew] . . . has finished with that train, applying all of the handbrakes . . ." "and [has] abandoned the track". Moreover, "[N]o one from the [road crew] are (sic) allowed to move the train or allowed in the track for any purpose while . . . carmen are performing their predeparture inspections". This Affidavit was filed in the trial court, and contained in the Fourth Circuit record.

Phillips himself "supplemented" his deposition testimony with an Affidavit, after the railroad filed its Motion for Summary Judgment. In part, Phillips explained

that, once he had applied all necessary handbrakes, "the [yard] engine is disconnected from the train", so that the car department inspection can occur, and the road engine connected to the newly-formed train. Phillips admitted in the Affidavit that, because his injury occurred prior to all of the handbrakes being set, the yard engine "was still connected to the train" at the time of his injury. Phillips' Affidavit was also part of the trial court and Fourth Circuit record.

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT, IN ACCORD WITH THE PLAIN LANGUAGE OF THE STATUTE, AND PRECEDENT FROM THIS COURT AND OTHER CIRCUIT COURTS, CORRECTLY HELD THAT THE SAFETY APPLIANCE DID NOT APPLY TO A RAILCAR BEING ASSEMBLED INTO A NEW TRAIN.

Phillips' lengthy recitation of case law and policy considerations all begs the narrow issue presented by this case: does the Safety Appliance Act (SAA) 49 U.S.C. 20301 et. seq., have application to railcars being assembled, from storage, into a new train. The United States Court of Appeals for the Fourth Circuit, after an exhaustive review of the statutory scheme and relevant case law from this Court and other circuit courts, correctly concluded that the Act did not apply.

Initially, CSXT submits that Phillips has vastly overstated the alleged consequences of the Fourth Circuit's

decision. The decision does not remove "normal railroad switching operations" from the ambit of the SAA, whenever those operations occur during the train's trip, from its start to its conclusion. In fact, *Deans v. CSX Transportation, Inc.*, 152 F.3d 326 (4th Cir. 1998) held that the SAA did apply to a newly assembled train, when departure was "imminent".

All that the Fourth Circuit has done is to construe the words of the statute ("use . . . on its railroad lines") in a commonsense manner and consistent with established precedent, as CSXT will now demonstrate. Notably, Phillips himself heavily relies upon one of this Court's opinions which squares with CSXT's position, *Brady v. Terminal R. Ass'n. of St. Louis*, 303 U.S. 10 (1938), at Pet. pp. 16-17.

In *Brady* the Court was addressing the scope of the then-SAA ladder provision, which language at that time was similar to the handrail provision. The railroad raised the specific defense to the SAA claim that, at the time of Brady's

injury, the defective railcar was not "in use". Rejecting the railroad's position, this Court specifically found the car to be "in use" because it had been "placed on a receiving track temporarily pending the continuance of transportation", 303 U.S. at 13.

Had this Court's earlier case of *United States v. Erie Railroad Company*, 237 U.S. 402 (1915), discussed at length at Pet. 19-23, settled the "in use" question for all switching movements, including the assembly of a new train, then the *Brady* Court's stated rationale for finding "use" would be superfluous. Precisely because *Erie* did not extend the SAA to all switching movements, but only to those while the railcar was "in use", this Court had to address the issue in *Brady*.

Significantly, right after the quoted *Erie* language, at Pet. 20, Phillips does not discuss the nine cases there cited, eight of which involve railcars being switched during the

course of their trip, see *Johnson v. Southern Ry. Co.*, 196 U.S. 1 (1904); *Schlemmer v. Buffalo R. & P.R. Co.*, 205 U.S. 1 (1907); *St. Louis I.M. & S.R. Co. v. Taylor*, 210 U.S. 281 (1908); *Chicago B&O R. Co. v. United States*, 220 U.S. 559 (1911) (railroad "conceded" that the railcars at issue were "in use"); *Delk v. St. Louis & S.F.R. Co.*, 220 U.S. 580 (1911); *Southern R. Co. v. United States*, 222 U.S. 20 (1911); *and Chicago Junction Ry. v. King*, 222 U.S. 222 (1911). In *Minneapolis, St. P. & St. Ste. M.R. Co. v. Popplar*, 237 U.S. 369 (1914), it appears that the worker was injured while decoupling a car from a train in mid-journey, to place that car on a siding.

In the ninth case, *Southern R. Co. v. Crockett*, 234 U.S. 725 (1914), a switchman was injured when a switch engine, taking a railcar to be added to a freight train, became uncoupled from the railcar (on which Crockett was positioned), and the railcar ran into the already-assembled standing cars. This Court simply "assumed" that the

movement was "of interstate commerce" and noted that the switch engine's coupler was defective. As the switch engine's job is *per se* was to help build new, outbound trains, that particular railcar was "in use" because its job necessarily preceded completion of the train.

The cases of this Court cited by *Erie* and decided since *Erie*, demonstrate that *Erie's* language was *dicta.*, if applied to railcars being assembled into a new train. The Fourth Circuit merely adhered to the fact pattern and rationale of the pre and post-*Erie* pronouncements of this Court.

Phillips dredges up two more of this Court's cases in his Petition, but neither is supportive. In *Great Northern R. Co. v. Otos*, 239 U.S. 349 (1915), the railcar in question was "loaded", and "had not been withdrawn from interstate commerce, but merely subjected to a delay . . .", 239 U.S. at 351. And *San Antonio Ry. v. Wagner*, 241 U.S. 476 (1916) was decided "under the assumption, although we find nothing in

the record to show that, in fact, plaintiff was employed in interstate commerce at the time he was injured", 241 U.S. at 480.

Nor does this Court's decision in *Texas & Pacific Railway Company v. Rigsby*, 241 U.S. 33 (1916) command a different result, although a review of *Rigsby* may point up an alternative ground upon which the Fourth Circuit could have relied for its holding. Rigsby was a switchman, who was injured when he fell from a defective ladder while taking a string of "bad order" cars to a repair shop. It was the railroad's position that the language of then 45 U.S.C. 1 "use in interstate commerce", made the SAA inapplicable. This Court rejected the railroad's position and held that railcars moving only "intrastate" were also covered by the SAA.

Because *Rigsby's* holding was specifically that "interstate commerce" was not confined to "in interstate

traffic", it had application to train and railcar movements, but not to their status. Whether a train being assembled is "in use" at all was a separate and distinct question that this Court addressed in *Brady, supra.*

However, by his reliance on *Rigsby,* Phillips has opened up the issue of the language of the SAA as of the date of Phillips' incident, July 20, 1994. On July 5, 1994, 49 U.S. 20301 took effect, and the "interstate commerce" language was eliminated from the SAA. SAA jurisdiction for any and every appliance was therefore based on the railcar or train being "in use". Those words had been defined in *Brady,* and followed consistently in *Estes v. Southern Pacific Transp. Co.,* 598 F.2d 1195 (10th Cir. 1979); *Trinidad v. Southern Pacific Transp. Co.,* 949 F.2d 187 (5th Cir. 1991); and *Morris v. CSX Transp., Inc.,* 481 S.E.2nd 585 (Ga. App. 1997), to refer to assembled trains in the course of their trip or "imminently" to depart (*Deans*).

While the Fourth Circuit noted that 49 U.S. 20301 *et. seq.* was a self-proclaimed recodification, so as not to change prior law (*Phillips*, Fn. 1, at Pet. 5a-6a), there is no dispute that ". . . use . . . on its railroad lines - " has now become *de jure* the single term of status for the entire SAA, 49 U.S.C. 20302(a). If *Rigsby* ever did provide for a different scope for the SAA, it can no longer be considered authority for such. Of course, as explained *supra.*, *Rigsby* did not purport to address the definition of "use".

Given the remedial purposes of the SAA, Phillips attempts to have this Court expand the SAA beyond its plain words. This Court recently refused such an invitation in *Norfolk & Western Railway v. Hiles*, 516 U.S. 400 (1995) when it held that the SAA could not be invoked by a railroader injured during the drawbar aligning process, as the SAA's provisions were confined to the coupling process only. Black's Law Dictionary, Deluxe 7th Ed., (West Group 1999) at

p. 154 defines "use" as follows: [T]he application or employment of something . . . employment of a thing for the purpose for which it is adapted." When railcars are moving from point A to point B as part of a train hauling freight (or passengers) they are clearly in use; when awaiting the start of the trip, they may be the "iron horse at the gate", but they are not "in use". If Congress decides to broaden the SAA to include the assembly of new trains, it may do so, but this Court has correctly refrained from the judicial enactment of such a law.

II. PHILLIPS HAS WAIVED HIS RIGHT TO A TRIAL OF HIS FORMERLY ABANDONED NEGLIGENCE CLAIMS

Phillips concedes that he voluntarily abandoned his negligence claims "for purposes of economy", and reliance upon Phillips' perception of earlier case law. Phillips also concedes, as to the latter point, that CSXT had filed a cross-motion for summary judgment at the trial court (Pet., p. 7),

so he was well aware of the railroad's view of the SAA's application to this case.

What Phillips fails to tell this Court is, that in his Fourth Circuit brief, he did not request, alternatively, a new trial if he lost on the liability issue. Nor did Phillips brief the issue of his abandonment of the negligence claims. The issue has been conceded and waived.

CONCLUSION

Because the Fourth Circuit's decision clearly comports with the plain language of the SAA, both prior and after recodification, and with the many precedents of this Court and other Circuit Courts, there does not appear to be any ground for extraordinary review by this Court. And, as Phillips has not shown any basis in law or fact to resurrect his knowing and voluntary abandonment of his negligence claim, that trial tactic surely presents no issue for extraordinary review.

This 4TH day of February, 2000.

Respectfully submitted,

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APPENDIX

APPENDIX

PERTINENT TEXT OF STATUTES INVOLVED IN THIS CASE

45 U.S.C. § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; employee defined

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the several States or Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being

employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

* * * *

45 U.S.C. § 53. Contributory negligence; diminution of damages

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

* * * *

45 U.S.C. § 56. Actions; limitations; concurrent jurisdiction of courts.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the

courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

* * * *

49 U.S.C. § 20301. Definition and nonapplication.

(a) Definition. In this chapter [49 USC §§ 20301 et seq.], "vehicle" means a car, locomotive, tender, or similar vehicle.

* * * *

49 U.S.C. § 20302. General requirements

(a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines --

(1) a vehicle only if it is equipped with --

(A) couplers coupling automatically by impact, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required,

secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if --

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

* * * *

Former 45 U.S.C. § 4. **Grab irons or handholds for security in coupling and uncoupling cars**

Until otherwise ordered by the Secretary of Transportation, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons on handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

* * * *

Former 45 U.S.C. § 6. **Failure to equip cars as provided; duty of United States attorneys and Secretary of Transportation; exceptions from operation of provisions**

Any common carrier engaged in interstate commerce by railroad using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of sections 1 to 7 of this title, shall be liable to a penalty of not less than $250 and not more than $2,500 for each and every such violation, to be assessed by the Secretary of Transportation and recovered in a suit or suits to be brought by the United States attorney in the district court of the United States for the judicial district in which such violation occurred or in which the defendant has its principal executive office; and it shall be the duty of such United States attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred; and it shall also be the duty of the Secretary of Transportation to lodge with the proper United

States attorneys information of any such violations as may come to his knowledge;

* * * *

Former 45 U.S.C. § 9. Power or train brakes; operation by engineer; rules for installation, inspection maintenance, and repair

Whenever, as provided in sections 1 to 7 of this title, any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall have their brakes so used and operated;

* * * *